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Disqualification for Bias—

Indiana in Prespective

JOHN PHILIP UPDIKE

Preface

The nature of bias and prejudice and its disqualifying capacity in administrative proceedings is, as a topic of examination, very broad. However, to narrow the scope of this paper, certain necessary assumptions have been made. It has been necessary to cast the following discussion in terms of the interested parties already before the administrative boards of Indiana. This is a very severe assumption upon my part since the claims of bias and prejudice will no doubt arise from only certain interested parties and since both acts herein discussed limit standing. However, I have attempted to present an overview of the types of challenges available to certain parties to administrative hearings which may be raised to effectuate a change in the composition of each of the boards. The questions of standing, of citizen suits, and of powers to raise issues are, therefore, beyond the scope of this article.

INTRODUCTION

In 1943, the Indiana Legislature created a Stream Pollution Control Board;¹ in 1961, it created an Air Pollution Control Board;² and then in 1972, the Legislature created an Environmental Management Board to coordinate and facilitate the efforts of the air and stream boards.³ The concern within the State Legislature for the environment reaches back more than two decades, and it would appear that the policy of the State is to become progressively more active in this area. However, the effectiveness of State programs to protect the Hoosier environment is necessarily dependent upon the dedication of those persons sitting on the various regulatory boards to pursue the goals of clean air and water as recognized by the Indiana legislature.

It is with this in mind that the composition of the Stream Pollution Control Board, the Air Pollution Control Board, and to a lesser extent the Environmental Management Board must be examined to determine whether the goals will be pursued vigorously. This examination is not made with the intent to impugn the character of any of the

members of the various boards, nor is it undertaken to challenge particular decisions made or positions taken in the past by any of the boards. Rather, the examination will focus on the possibility of challenges both to the individual members of the boards as well as to the particular boards on the basis of bias and prejudice of the majority of members on each board against the strict enforcement and promotion of legislatively prescribed environmental standards.

The focus of concern concededly concentrates upon the present or past employment of board members and the interests they represent and upon those board members who are appointed to the boards as representatives of special interests which have traditionally been hostile to enforcement of strong environmental regulations. Therefore, the issue to be here considered is whether, in controversies brought before the Stream Pollution Control Board and the Air Pollution Control Board, these boards are open to attack and are subject to disqualification on the basis of bias and prejudice as a consequence of the composition of each of the boards?

EXAMINATION OF RELEVANT INDIANA STATUTES

A brief examination of the statutory language creating and defining each of the boards will put into proper perspective the subsequent analysis of how the composition of the boards may be challenged.

Environmental Management Board

The Environmental Management Board has most recently been created for "the establishment of priorities and coordination of the functions and services" of the air and stream boards.⁴ This purpose indicates the strictly supervisory role of the board which is further illustrated by the duty of the board to create a state program for the "development and control of the environment to ensure for the present and future generations the best possible air, water and land quality."⁵ In addition to other programming duties, the board is delegated broad regulatory powers "to preserve, protect and enhance the quality of the environment, to assure the accomplishment of the comprehensive long-term program; and procure compliance with its standards and regulations."⁶ However, even with these broad regulatory powers, the Environmental Management Board has not as of yet assumed the role of promulgating standards and conducting hearings. Given the narrow scope of the function of this board and the failure of the members to exercise review or rule-making authority, further examination of this particular board will not be undertaken.

Air Pollution Control Board

The Air Pollution Control Board was created "to maintain the purity of the air resource of the state, which shall be consistent with protection of the public health and welfare and the public enjoyment thereof . . . through the prevention, abatement and control of air pollution by all practical and economically feasible methods."⁷ The power to accomplish these goals has been vested in the board by the legislature to the extent that the board may "make investigations, consider complaints and hold hearings"⁸ and may "adopt and promulgate reasonable rules and regulations consistent with the general intent and purposes of this act."⁹ In addition, the air board is empowered to issue orders and determinations to effectuate the purposes of this act and to enforce such orders, determinations, rules and regulations under the Indiana Administrative Adjudication and Court Review Act, hereafter referred

to as the A.A.A.¹⁰ Therefore, primary responsibility for enforcing federal and state standards in air pollution control has been delegated to this board.

The Air Pollution Control Board is composed of seven members of whom one is *ex officio*, the secretary of the Indiana State Board of Health, while the remaining six (a physician, graduate engineer, and representatives of: agriculture, industry, municipal government, and the general public) are appointed by the governor.¹¹ The discharge of contaminants into the air explicitly violates public policy,¹² and the board is empowered to “hold a hearing with respect to any suspected violation of the provisions of this act. . . .”¹³ Special provision is made for the Indiana A.A.A. to apply to the hearing proceedings as well as the appeal process.¹⁴ Pursuant thereto, aggrieved parties may appeal decisions by the air board by alleging that the decision is:

- (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
- (2) contrary to constitutional right, power, privilege or immunity; or
- (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial evidence.¹⁵

“On such judicial review such court shall not try or determine said cause *de novo*, but the facts shall be considered and determined exclusively upon the record filed with said court pursuant to this [A.A.A.].”¹⁶ The intent underlying the A.A.A. would appear to be one of reliance on the expertise of the air board while affording parties protection from wrong decisions.

Stream Pollution Control Board

The purpose for creation of this board is stated in terms of “jurisdiction to control and prevent pollution in waters of this state with any substance which is deleterious to the public health or to the prosecution of any industry or lawful occupation, or whereby any fish life or any beneficial animal or vegetable life may be destroyed, or the growth or propagation thereof prevented or injuriously affected.”¹⁷ To effectuate this jurisdiction, the stream board has the power to determine and pass water quality standards, issue regulations and orders, and conduct hearings on alleged violations.¹⁸ In addition, the board may also conduct investigations and inspections in relation to water quality anywhere within the State.¹⁹

To violate standards or regulations created by the stream board or to contribute to the pollution of State waters is unlawful,²⁰ and specific provision is made for agency hearing upon notice of the violation and order to cease and abate.²¹ The interesting aspect, however, of this act is the provision for enforcement of an agency decision. For failure to comply with the decision, the agency may file in court for enforcement, and thereupon, either party may request that the civil action be tried *de novo*.²² However, the act makes no provision for judicial review of the agency decision on petition of an aggrieved party. The argument has been made that an appeal should follow the above enforcement provision and be *de novo*. But such argument has been rejected, and judicial review on appeal from the agency

decision follows the A.A.A. provisions discussed above in regard to the air pollution control board.²³

The stream board is composed of seven members. Three of the members are *ex officio*: Secretary of the Indiana State Board of Health, Director of the Department of Conservation, and Lieutenant-governor. The remaining four members are appointed by the Governor, but no specific qualifications are prescribed.

COMPOSITION OF THE BOARDS

Having summarized the most significant aspects of the statutory provisions relating to the topic herein considered, it is necessary to recognize the individuals who are on the air and stream boards and their respective backgrounds and/or interests. For the reasons noted above in discussing the Environmental Management Board, the members of that board will not be reviewed.

The Air Pollution Control Board is composed of seven members, six of whom are appointed by the Governor. The following is a list of the present members and an identification of the interests they represent.²⁴

Health Commissioner, State Board of Health (*ex officio*); Chairman, an Indianapolis attorney (representative of the general public); Vice Chairman, a graduate engineer for a large manufacturing concern; a steel company executive (representative of industry); an official of the Indiana Farm Bureau (representative of agriculture); a retired public official (representative of municipal government); and an assistant professor of ophthalmology, a physician.

The Stream Pollution Control Board is composed of seven members, four of whom are appointed by the Governor without restriction or limitation. The following is a list of the present members and an identification of the interests they represent.²⁵

Health Commissioner of the State Board of Health, the Lieutenant-governor, and the Director of the Indiana Department of Natural Resources (*ex officio*); two business executives, an attorney with an engineering background, and a retired engineer.

Examination of the above lists reveals that the only person representing both a specific environmental interest and knowledge in the area is the Director of the Department of Natural Resources. A representative of the general public is required on the air board, but it is unclear how he is qualified to represent such an interest. The remaining members exhibit what would appear to be a conspicuous lack of expertise in the field of environmental concerns. While the attitudes of the various individuals cannot be revealed matter-of-factly, it would seem reasonable to acknowledge that the vast majority of members have a continuing relationship with interests often in conflict with environmental standards. In fact, both boards seem to be stacked with representatives of interests most likely to be affected by regulation under the statutes, and this over-balance is due in part to the Legislature.

DISQUALIFICATION FOR BIAS AND PREJUDICE

Generally, there are four broad classifications of bias recognized in the field of administrative law: bias or prejudice regarding a "point of view about issues

of law or policy,” a “bias or prejudgment concerning issues of fact about the parties in a particular case,” “partiality” or a “personal bias or prejudice” as represented by an “attitude for or against a party as distinguished from issues of law or policy,” and an “interest” in the proceeding.²⁶ Concern about possible bias is directed to the ability of agency members to function in a fair and objective manner. “Due process involves the right of persons to be heard, so far as feasible, in all matters affecting their individual interests together with the objective weighing of relevant factors by the deciding authority in reaching conclusions.”²⁷

This necessarily leads to the question of what standards of fairness are to be applied generally to administrative hearings. Justice Cardozo directed himself to this question, saying,

Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. (cites omitted) Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the “inexorable safeguard” (cite omitted) of a fair and open hearing be maintained in its integrity. (cites omitted) The right to such a hearing is one of “the rudiments of fair play” (cite omitted) assured to every litigant by the Fourteenth Amendment as a minimal requirement. (cites omitted) There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.²⁸

Justice Cardozo’s position has been followed and expanded in the development of minimum requirements for administrative proceedings. In *National Labor Relations Board v. Phelps*,²⁹ the court recognized that the requirement of an “unbiased and non-partisan trier of the facts” is the same for both administrative and judicial proceedings. But the court also went on to say that if any distinction did exist, it would be that the “requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around the court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.”³⁰ According to the court in the *Phelps* case, once there is evidence of bias and prejudice on the part of the trier, panel, or board as the case may be, the judgment may not be preserved even if supported by some evidence because of the taint of unfairness.³¹ In Indiana, the Supreme Court has recently said in denying enforcement of an order issued by the Board of Public Works and Safety that, “[l]itigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.”³²

It is within this context that the above mentioned types of bias must be examined to determine if any will be fatal to the capacity of a member of an administrative agency to sit in a hearing. The first type of bias involves purely personal views

on issues of law or policy. Traditionally, this has not been a disqualifying bias. "A bias, if it is to be a disqualification, must mean something more than an ideological bent: if it meant no more, the creation of a bench before which cases could be tried or appeals could be argued would indeed become difficult if not wholly impossible."³³ Applying this to the question of bias and prejudice of members of the Indiana air and stream boards, it would obviously be insufficient to allege that certain members personally do not believe in the importance of environmental regulation, and thus something more would have to be shown.

A second type of bias which may be disqualifying concerns the prejudgment of issues of fact in a particular case. This, too, is a very narrow type of bias. To be disqualified pursuant to this type of challenge would require comments and actions on the part of individual members indicating that, upon certain facts, objectivity would be nonexistent. It should be noted that involvement of an administrative agency in investigation prior to hearings on possible violations does not create such bias or prejudice. Such would be official contact with the facts and would not result in a deprivation of due process.³⁴

A third type of bias more closely related to the concern of prejudgment on the basis of background and occupational interests is that of partiality. Often, this type of bias is represented by a relationship of some nature to one of the parties or individuals or a well-focused antagonism toward a party.³⁵ "Personal prejudice—an attitude of favoritism or animosity toward a particular party—disqualifies when it is substantial."³⁶ Such was the case when the court in *Phelps, supra*,³⁷ refused to enforce the N.L.R.B. order saying that "the examiner exhibited resentment and spleen toward them and gave expression to his pre-determined opinion of their guilt on the charges he was supposed to be trying."

Partiality and predetermination of the questions would, therefore, seem to follow from strong past and present relationships with special interests which are subject to regulation and are primarily concerned about the scope of enforcement of state and federal standards as in the areas of air and water pollution. It has already been noted that all but perhaps four members of the air and stream boards in Indiana represent interests affected by the enforcement of environmental standards. Because of the interest representation, the occupational backgrounds, and the attitudes of the persons herein discussed, danger of the natural consequence of partiality toward related interests and parties may be significant enough to support challenges of bias and prejudice directed at individual members.

It must be noted that in the case of *Mikus v. U.S.*,³⁸ the court refused to excuse jurors "for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case" without a "showing of actual bias or prejudice." However, in the case of the air and stream boards in Indiana, present and past occupational relationships are so intertwined with personal interests of individual members of the air and stream boards that parties representing environmental interests in licensing and permit cases and in hearings on violations of standards or regulations should be permitted to challenge individual members on the basis of partiality. "Disqualifications of judges and of administrators—does not come to pass because one *knows* that the hearing will be unfair, but because it *might* be unfair and it is much better to avoid the risk

if one can.”³⁹ Therefore, an appropriate challenge founded upon this type of bias might be sustained.

A fourth type of bias is represented by an interest in the outcome of the proceedings. Analogized to the judicial process, “the due process clause forbids a trial before a judge who has a direct, personal, pecuniary interest in the outcome.”⁴⁰ On this basis, it may be possible to examine the present and past occupational relationships to determine if a particular decision in a case will in one way or another benefit any of the members of the air or stream boards. If so, a challenge of bias would necessarily be sustained.

This type of bias has been expanded in *Johnson v. Michigan Milk Marketing Board*⁴¹ to sustain a constitutional challenge to an entire board on the basis of its composition. In that case, the Michigan legislature created the Milk Marketing Board to be composed of the Commissioner of Agriculture and four members to be appointed by the governor: two milk producers, one milk distributor, and one representative of consumers. The board proceeded to set minimum prices to be paid to producers by distributors and the minimum prices to be charged to consumers. Then it attempted to enforce these regulations against Johnson. Johnson, a milk distributor, alleged that a majority of the board had a direct pecuniary interest in these matters, and the court found in fact that a majority of the members were judging their own cause thus precluding an impartial hearing and violating the requirements of due process.⁴² Consequently, the court held that “[i]n order that the administration of the milk industry may be conducted in a fair and impartial manner, it is essential that the Board be impartial in its composition. The act is fatally defective in its provision for the appointment of the personnel of the Board.”⁴³ All orders of the Board were vacated and the act was declared unconstitutional on the basis of the composition of the Board as tested by the principle of due process.

The *Johnson* case was immediately criticized⁴⁴ and has since been distinguished, although not overruled, by the Michigan courts.⁴⁵ In fact, the court in *Sponick v. City of Detroit Police Dept.* said “[d]ue process is satisfied if the hearing is conducted by someone who did not participate in the decision under review.”⁴⁶ However, *Johnson* would appear to still be good law for the proposition that rule-making authority cannot be vested in agencies in which a majority of the members will have a pecuniary interest and will be regulating for their own interest.⁴⁷

In Indiana, *Lucas v. State*⁴⁸ is the closest case on the point involving the denial of a license to a chiropractor by the Board of Medical Registration and Examination. In dismissing the constitutional challenge which followed the *Johnson* line of attack, the court said that it could find no direct financial interest. The Court also said “[t]he composition of the Board of Medical Registration and Examination, and the manner in which it may function, is a legislative question, and not judicial, (cite omitted), the wisdom of which is a matter to be determined by the Legislature. (cites omitted) So long as the Constitution is not offended, we may not interfere with its enactments.”⁴⁹ However, a constitutional challenge to the air and stream boards may still be possible under a *Johnson* type analysis in cases involving the rule-making functions of the two boards as opposed to their licensing and permit functions since over half of the members of the boards represent

interests which will benefit directly or indirectly from lax regulation and enforcement. It would be necessary to argue an unconstitutional delegation of the powers to promulgate rules and regulations to individuals directly involved with specific parties or interests to be regulated. Such an argument would appear to be a logical extension of the direct interest principle of *Johnson*.⁵⁰

However, as already noted, *Johnson* arose through agency action to enforce compliance with the regulations duly promulgated. Johnson was in fact a member of the class subject to regulation, and he opposed the enforcement of regulations adverse to his interests. His challenge was upheld on the basis that the Legislature placed power in persons on the board who had pecuniary interests in the particular regulations complained of by Johnson. It would appear difficult to extend this rationale directly to the Indiana air and stream acts. Such a constitutional challenge to delegation of legislative authority could not arise because a case of the air or stream board being pecuniarily interested in strict enforcement of environmental standards (except in a most tangential way) against a polluter is absurd. Rather, a case challenging the constitutionality of delegation of legislative authority as prescribed by the Legislature will have to arise with a party seeking strict adherence to existing standards before one of the boards. Pursuant to a refusal to enforce, the constitutionality of the particular Act could be challenged in an appeal. The problem here is one of getting the party pressing for strict regulation before the board initially.

This issue directed at possible pecuniary interest of the individual board members may be eliminated, at least in regard to the stream board, if Indiana is allowed to administer the National Pollutant Discharge Elimination System Act within the State. Membership upon the stream board would then be governed by the following federal regulation:

Each State or interstate agency participating in the N.P.D.E.S. shall insure that any board or body which approves N.P.D.E.S. permit applications or portions thereof shall not include as a member, any person who receives, or has during the previous 2 years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit . . .
(d) For the purposes of this section, the term "income" includes retirement benefits, consultation fees, and stock dividends.⁵¹

Doctrine of Necessity

Even if bias is discovered which would disqualify certain individuals on the boards, disqualification might not be permissible if the boards would be disqualified and no alternative forums existed under law.⁵² Such would be the case regarding the license and permit functions of the air and stream boards. But it does not appear that even in cases where no other forum is available, the boards are prohibited from ruling on the qualifications of their members except to the extent that a quorum must be preserved. In a case, however, involving a constitutional challenge, the doctrine of necessity would appear to be unavailable to preserve the boards for the reason that the doctrine cannot and was not designed to counter-balance such a defect. In such a case, the composition of the boards would have to be revised.

Procedure

The allegation of bias must be presented at the outset of the administrative hearing although “[o]bjections going to the personal attitudes of the tribunal will not be heard prior to a final determination.”⁵³ If disqualification for antecedent or current relationships is denied, then upon the conclusion of the administrative hearing appeal should be taken under the A.A.A.⁵⁴ While judicial review “is limited to a consideration of whether or not the order was made in conformity with proper legal procedure, is based upon substantial evidence, and does not violate any constitutional, statutory, or legal principle . . .”⁵⁵ the court must determine whether there was bias and consequently “. . . whether in fact the hearing has been unfair.”⁵⁶ It would appear that the constitutional challenge could only be raised upon judicial review because the air and stream boards cannot entertain such a challenge.

CONCLUSIONS

The statutory purposes for creation of the air and stream boards identify legislative concern for protection of the environment. Because of strong professional ties, both present and antecedent, many members on the Indiana environmental boards represent special interests closely aligned with industry and commerce and may project their own biases to the detriment of the environmental policies and regulations set forth in the air and stream acts. There can be no doubt that to a certain extent accommodation must be made between environmental pursuits and practicality. However, the composition of the Indiana boards reveals almost a complete lack of environmental expertise while representatives of special interests traditionally opposed to strict environmental standards constitute a large percentage of the membership. Various challenges predicated on bias and unfairness have been sketched above, but pressures brought to bear on the Governor who makes appointments and on the State Legislature for the express purpose of revising the prescribed membership schemes may be more fruitful. But whatever the approach taken, the goal should be to invest the power in environmental experts to promote the express policies and provisions of the acts herein discussed.

FOOTNOTES

¹Indiana Code §§13-1-3-1 et seq. (Indiana Annotated Statutes §§68-517 et seq.), Acts 1943, ch. 214, §1, p. 624). [hereinafter cited as I.C. and I.A.S.]

²I.C. §§13-1-1-3 et seq. (I.A.S. §§35-4603 et seq.).

³I.C. §§13-7-2-1 et seq. (I.A.S. §§35-5203 et seq.).

⁴I.C. 13-7-2-9, (I.A.S. 35-5211).

⁵I.C. 13-7-3-1(a), (I.A.S. 35-5213).

⁶I.C. 13-7-3-1(b), (I.A.S. 35-5213).

⁷I.C. 13-1-1-1, (I.A.S. 35-4601).

⁸I.C. 13-1-1-4(1), (I.A.S. 35-4604).

⁹I.C. 13-1-1-4(3), (I.A.S. 35-4604).

¹⁰I.C. 13-1-1-4(2&4), (I.A.S. 35-4604).

¹¹I.C. 13-1-1-3, (I.A.S. 35-4603).

¹²I.C. 13-1-1-7, (I.A.S. 35-4605).

¹³I.C. 13-1-1-8, (I.A.S. 35-4606).

¹⁴I.C. 13-1-1-8, (I.A.S. 35-4606).

¹⁵I.C. 4-22-1-14, (I.A.S. 63-3014).

¹⁶I.C. 4-22-1-18, (I.A.S. 63-3018).

¹⁷I.C. 13-1-3-4, (I.A.S. 68-520).

¹⁸I.C. 13-1-3-7, (I.A.S. 68-523).

¹⁹I.C. 13-1-3-6, (I.A.S. 68-522).

²⁰I.C. 13-1-3-8, (I.A.S. 68-524).

²¹I.C. 13-1-3-9, (I.A.S. 68-525).

²²I.C. 13-1-3-11, (I.A.S. 68-527).

²³*City of Plymouth v. Stream Pollution Control Board* (1958), 238 Ind. 439, 151 N.E.2d 626, holding that judicial review by an aggrieved party pursuant to a stream board decision is provided for by the A.A.A., and there is no right to a trial *de novo*.

²⁴The identification of members of the air and stream boards was provided by Professor Nicholas L. White, Professor of Law, Indiana University.

²⁵See footnote 24 *supra*. See also, I.C. 13-1-3-2, (I.A.S. 68-518).

²⁶Davis, *Administrative Law Text*, West, 3rd ed. 1972, p. 245.

²⁷Fuchs, Ralph F., "Fairness and Effectiveness in Administrative Agency Organization and Procedures", 36 *Ind. L. J.* 1, 29.

²⁸*Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1937), 301 U.S. 292, 304-305.

²⁹*N.L.R.B. v. Phelps*, 136 F.2d 562, 563 (5th Cir., 1943).

³⁰*N.L.R.B. v. Phelps*, *supra* at 563.

³¹*N.L.R.B. v. Phelps*, *supra* at 563-564.

³²*City of Mishawaka v. Stewart* (1974), 310 N.E.2d 65, 70.

³³Gelhorn and Byse, *Administrative Law—Cases and Comments*, Foundation Press, 4th ed. 1960, p. 935.

- ³⁴Gelhorn and Byse, *supra* at 945.
- ³⁵Gelhorn and Byse, *supra* at 939.
- ³⁶Davis, *supra* at 253.
- ³⁷*N.L.R.B. v. Phelps*, *supra* at 564.
- ³⁸*Mikus v. U.S.*, 422 F.2d 719, 724 (2d Cir., 1970).
- ³⁹Gelhorn and Byse, *supra* at 948.
- ⁴⁰Gelhorn and Byse, *supra* at 938. See, *Tumey v. Ohio* (1927), 273 U.S. 510.
- ⁴¹*Johnson v. Michigan Milk Marketing Board* (1940), 295 Mich. 644, 295 N.W. 346.
- ⁴²*Johnson*, *supra* at 351-353.
- ⁴³*Johnson*, *supra* at 351.
- ⁴⁴See, 54 *Harvard L. Rev.* 872-873.
- ⁴⁵See, *People v. Murphy* (1961), 364 Mich. 363, 110 N.W.2d 805, and *Sponick v. City of Detroit Police Dept.* (1973), 49 Mich. App. 162, 211 N.W.2d 674.
- ⁴⁶*Sponick*, *supra* at 685. See also, *Morrissey v. Brewer* (1972), 408 U.S. 471, 486, *Goldberg v. Kelly* (1970), 397 U.S. 254, 271.
- ⁴⁷See, *Southeast Milk Sales Association, Inc. v. Swarigen*, 290 F.Supp. 292 (N.D. No. Car., 1968), on similar facts, distinguishes *Johnson* on the basis of provision in the North Carolina Act for appeal from the agency ruling to be heard *de novo*, whereas in *Johnson* the agency findings were closed to scrutiny except upon questions of law. Appeal provisions under the air and stream acts and the Indiana A.A.A. are similar to those existing in the *Johnson* case.
- ⁴⁸*Lucas v. State* (1951), 229 Ind. 633, 99 N.E.2d 419, *cert.den.* 342 U.S. 919, 96 L.Ed. 687, 72 S.C. 366.
- ⁴⁹*Lucas v. State*, *supra* at 425.
- ⁵⁰See, 40 C.F.R. §124.94—Agency Board Membership—for federal requirements for participation in the N.P.D.E.S. to protect against the direct pecuniary interests of administrative agency members as in *Johnson*. Specific federal regulation against such direct interest only reinforces the argument that any such direct interest is improper.
- ⁵¹40 C.F.R. §124.94.
- ⁵²*Brinkley v. Hassig*, 83 F.2d 351 (10th Cir., 1936), for the rule that “disqualification will not be permitted to destroy the only tribunal with power in the premises.”
- ⁵³Jaffe, *Judicial Control of Administrative Action*, Little, Brown and Co., 1965, p. 441 note 65. See also, *S.E.C. v. R.A. Holman*, 323 F.2d 284 (D.C. Cir., 1963).
- ⁵⁴I.C. 4-22-1-14, (I.A.S. 63-3014).
- ⁵⁵*City of Michawaka v. Stewart* (1974), 310 N.E.2d 65, 68.
- ⁵⁶*N.L.R.B. v. Phelps*, 136 F.2d 562, 567 (5th Cir., 1943) citing from *N.L.R.B. v. Acme-Evans Co.*, 130 F.2d 477 (7th Cir., 1942).